



EUROPEAN COMMISSION

DG Competition

***Case M.9250 – GVB /
HTM / NS / RET / JV***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERCER PROCEDURE**

Article 4(4)

Date: 31.3.2020



EUROPEAN COMMISSION

Brussels, 31.3.2020
C(2020) 2082 final

PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying parties

**To the Netherlands Authority for
Consumers and Markets (ACM)**

Subject : Case M.9250 – GVB / HTM / NS / RET / JV
Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004¹ for referral of the case to the Netherlands and Article 57 of the Agreement on the European Economic Area².

Date of filing: 25.02.2020

Legal deadline for response of Member States: 17.03.2020

Legal deadline for the Commission decision under Article 4(4): 31.03.2020

Dear Sir or Madam,

1. INTRODUCTION

- (1) On 25 February 2020, the Commission received by means of a Reasoned Submission a referral request pursuant to Article 4(4) of the Council Regulation (EC) No 139/2004 (the “Merger Regulation”) with respect to the transaction cited above. The parties request the operation to be examined in its entirety by the competent authorities of the Netherlands.

¹ OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

- (2) According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the parties to the transaction may request that their transaction be referred in whole or in part from the Commission to the Member State where the concentration may significantly affect competition and which presents all the characteristics of a distinct market.
- (3) A copy of this Reasoned Submission was transmitted to all Member States on 25 February 2020.
- (4) By letter of 5 March 2020, the Authority of Consumers & Markets (“ACM”) as the competent authority of the Netherlands informed the Commission that the Netherlands agrees with the proposed referral.

2. THE PARTIES AND THE CONCENTRATION

- (5) GVB Holding N.V. (“**GVB**”) is part of the GVB group, which is a public transport operator, operating metro, tram, bus and ferry services in the Amsterdam metropolitan area. On average, the GVB group transports 850.000 travellers each day and this is expected to grow to 1 million travellers. GVB is owned by the municipality of Amsterdam.
- (6) HTM Personenvervoer N.V. (“**HTM**”) is part of the HTM group, which is a public transport operator with tram, bus and light rail transport, operating in the Haaglanden region, which consists of The Hague, Delft, Rijswijk, Voorburg, Leidschendam, Nootdorp, Wateringen and Zoetermeer. HTM group transports around 258.000 travellers each day. HTM is owned by the municipality of The Hague and Public Transport Authority MRDH (i.e. for the Rotterdam-The Hague Metropolitan Area).
- (7) NS Groep N.V. (“**NS**”) is part of the NS group, which is a national public transport operator from the Netherlands. The NS group transports around 1 million travellers on an average day. It operates train services and related services such as the public transport bike (OV-Fiets). NS is owned by the Dutch State.
- (8) Rotterdamse Elektrische Tram N.V., or R.E.T. N.V. (“**RET**”) is part of the RET group, which is the public transport company of the Rotterdam city region providing metro, tram, bus and ferry transport. With 3.500 employees they transport more than 600.000 travellers every day. RET is owned by the municipality of Rotterdam and Public Transport Authority MRDH.
- (9) GVB, HTM, RET and NS are hereafter collectively referred to as “the Parties”.
- (10) The proposed concentration (the “Transaction”) concerns the acquisition of joint control, within the meaning of Articles 3(1)(b) and 3(4) of the EU Merger Regulation, over a newly created full function joint venture (the “**JV**”) by GVB, HTM, NS and RET. GVB, HTM, NS and RET are referred to collectively as the “Parties”.
- (11) The JV will build a platform in order to connect Mobility providers and providers of Mobility as a Service (MaaS). According to the Reasoned Submission made by the Parties, the platform will essentially provide complementary IT/connectivity services to Mobility providers and MaaS providers in order to link these parties and make it easier for these parties to offer mobility solutions to end users/travellers through a MaaS app. The JV will build a MaaS platform, connect Mobility providers and

MaaS providers and is responsible for the maintenance, service and further development of the platform.

- (12) The JV will be jointly controlled by the Parties, since its strategic decisions, including decisions regarding the annual budget, annual business plan and major investments, require unanimous consent by the Parties.
- (13) The JV will be full-function, since it will have a board dedicated to its day-today operations and access to sufficient resources (funded through a combination of starting capital and revenues and at least [...] staff; it will operate autonomously on the market; it will perform activities beyond one specific function for the Parties and the Parties estimate that a substantial amount (more than [>50]%) of the JV's future users will be third parties. It will operate on a lasting basis, as it is established for an indefinite duration.

3. EU DIMENSION

- (14) The Transaction has an EU dimension within the meaning of Article 1(2) of the Merger Regulation. The undertakings concerned have a combined aggregate world-wide turnover³ of more than EUR 5 000 million.⁴ Each of them has an EU-wide turnover in excess of EUR 250 million⁵ and not each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension within Article 1(2) of the Merger Regulation.

4. ASSESSMENT

4.1. Relevant product market

- (15) On the basis of the information submitted in the Reasoned Submission, the proposed transaction mainly concerns the wholesale and retail supply of MaaS services in the Netherlands, as well as public transport in the Netherlands. The Parties' and the JV's activities do not overlap outside the Netherlands.

4.1.1. Wholesale supply of MaaS (platform) services

(a) Relevant product market

- (16) The Parties consider that the JV will be active on the market for the supply of IT services.
- (17) The market(s) for the wholesale of MaaS services has not yet previously been examined by the European Commission. It is a nascent market. In its past practice,⁶ it has considered that the market for IT services can be segmented depending on (i) the functionality of services and (ii) different sectors in which customers are active but has eventually left open the exact product market definition.

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice of 10/07/2007.

⁴ GVB: EUR 482 million; HTM: EUR 283 million; NS: EUR 5 926 million; RET: EUR 467 million.

⁵ GVB: EUR 482 million; HTM: EUR 283 million; NS: EUR 5 926 million; RET: EUR 467 million.

⁶ See, for instance, M.6921 IBM ITALIA/UBIS, paragraphs 12-13 and 22-25, and M.8765 Lenovo/Fujitsu/FCCL, paragraphs 23 – 25.

- (18) In the current case, the Commission considers it likely that the wholesale supply of MaaS (platform) services is a distinct product market. From a demand-side perspective, it is likely that customers of MaaS platforms have different functional requirements than those that would apply for customers for other applications. From a supply-side perspective, the Commission at this stage leaves open whether all suppliers active in a market for IT services would be competent to fulfil the technical requirements needed in the sub-segment for MaaS platforms. However, the Commission notes that the success of a platform service is dependent on the ability to attract customers on both sides of the platform, i.e. public transport and MaaS providers respectively. In that regard, the Commission considers that the Parties have a very strong market position one side of the platform, and that alternative MaaS platforms would not be able to compete on equal footing (or potentially not be viable) without the Parties participating in such a platform. Therefore, the Commission considers supply side substitutability, namely for suppliers active in IT services to switch to the supply of MaaS platforms, to be limited.
- (19) On this basis, and without prejudice to the ACM's investigation, the Commission considers it likely that the wholesale supply of MaaS (platform) services is a distinct product market.
- (b) Relevant geographic market
- (20) The Parties submit that the market for IT services is at least EEA wide.
- (21) While this may be true for the procurement of IT services needed to build a platform, the Commission notes that the market for the supply of wholesale of MaaS (platform) services is national or even sub-national. As noted above, a platform is required to attract customers on both sides of the platform, and the markets in which these two sides operate are national or sub-national in scope. The JV's platform will operate on the Dutch market. The platform, as well as competing platforms, will therefore require the participation of local transport providers and local MaaS providers that are active on the Dutch market (or any plausible sub-national market within the Netherlands). Platforms active in other countries in that regard do not compete with platforms active in the Netherlands, and vice versa.
- (22) On the basis of the above, but without prejudice to the ACM's investigation, the Commission considers for the current case that the relevant geographic market for the wholesale supply of MaaS (platform) services is national, or narrower.

4.1.2. Retail supply of MaaS (app) services

- (a) Product market
- (23) The Parties consider that that the appropriate product market in this case constitutes the market for MaaS services (to end-users).
- (24) In a recent (Article 9) referral decision to the ACM of 15 January 2020 (case M.9545), concerning the proposed creation of a joint venture that will combine NS' and Pon's retail MaaS (app) offers, currently operating under the brand names Hely and Next Urban Mobility ("Next"), the Commission considered that the relevant product market consisted in the market for retail distribution of MaaS services (also called "retail distribution transport/mobility services through an app" throughout the decision).

- (25) The Commission does not consider there to be any factors in the current case that would justify a deviation of that market delineation.
- (26) On this basis, but without prejudice to the ACM's investigation, the Commission considers for the current case that the relevant product market is the retail supply of MaaS services.
- (a) Geographic market
- (27) The Parties consider that the market for MaaS services is at least national in scope.
- (28) In its recent referral decision to the ACM (case M.9545), the Commission considered that the market for retail distribution of MaaS services is national in scope.
- (29) The Commission does not consider there to be any factors in the current case that would justify a deviation of that market delineation.
- (30) As also confirmed by the Parties, the customers of the JV, i.e. Mobility and MaaS providers, provide their services generally at national or local level, and there are national barriers for Mobility and MaaS providers to offer their services to a customer base in another country. In addition, from a traveller perspective, there is typically a demand for local or national mobility services and MaaS services.
- (31) On this basis, but without prejudice to the ACM's investigation, the Commission considers for the current case that the relevant geographic market is national in scope.

4.1.3. *(Public) transport services*

- (a) Product market
- (32) The Parties are all publicly owned public transport operators with various activities, including passenger transport services. GVB, RET and HTM ("G3", three Big City public transport providers) are public companies that are only allowed to offer public transport services (tram, metro, light rail and buses) in their respective territories/networks in the Amsterdam, Rotterdam and The Hague regions. On the basis of a concession, NS operates its HRN ("Hoofdrailnet" or "Main Rail Network") and has the exclusive right for the period 2015-2025 to offer Intercity and (regional) Sprinter rail services on a national scale, including routes to and from Amsterdam, Rotterdam, and The Hague regions.
- (33) The Parties claim that the relevant market definition could be based on the respective concessions of the Parties. Under this approach, each of GVB, RET, HTM and NS would be active in separate relevant markets for public transport based on their concession (in Amsterdam, in Rotterdam, in The Hague and in NS's "Hoofdrailnet" or "Main rail Network" respectively), in which it would then have a 100% market share.
- (34) The Commission has previously considered a product market that comprises all passenger transport⁷ as well as relevant product markets as narrow as a specific modality, such as rail services.⁸

⁷ M.8744 *Daimler/BMW/Car Sharing JV*, paragraph 32.

(35) The Commission considers that, for the purpose of assessing the referral request and without prejudice to further investigation by the ACM, the relevant product market definition is likely to be either comprising all passenger transport, or a more narrow market such as rail services. The Parties (among which NS, the main rail operator in the Netherlands) hold a strong market position in a narrower market that encompasses rail services. In addition, they are also likely to be very important suppliers in a wider market that would comprise all passenger transport, as they are the main public transport providers in certain areas in the Netherlands. Furthermore, the Commission cannot exclude that the Parties are, beyond their market position in a wider market, essential Parties to MaaS platforms. Therefore, the Commission considers that the market definition can be left open for the current decision, as the theories of harm described in paragraphs (44) - (46) would apply regardless of the exact delineation.

(b) Geographic market

(36) The Parties are of the opinion that the geographic public transport markets are in principle national in scope.

(37) In previous decisions, the Commission has defined the relevant geographic market by reference to the extent of the network comprising the railway routes, stations and depots that are the subject of a particular franchise agreement.⁹ In other decisions, the Commission has considered that the relevant geographic market may be defined as an individual point-to-point route.¹⁰

(38) In light of the above, and in line with its previous decisional practice, the Commission considers that, for the purpose of assessing the referral request, the exact geographic market definition can be left open, since the Transaction may significantly affect competition in any of the alternative markets, whether at national level (in the Netherlands) or local level (comprising the Parties' networks or route-by-route).

4.2. Conclusion on market definition

(39) For the purpose of assessing the referral request, the exact product and geographic market definitions can be left open. The JV only operates in the Netherlands, on the Dutch MaaS services market, and the complementary activities of the Parties concern the Dutch national or local markets for public transport, which present all the characteristics of a distinct market. On that basis, even on the widest plausible geographic market definition, the Transaction would not affect any markets outside the Netherlands.

4.3. Assessment of the referral request

4.3.1. Legal requirements

(40) According to the Commission Notice on case referral¹¹ (the "Notice"), in order for a referral to be made by the Commission to one or more Member States pursuant to Article 4(4), the following two legal requirements must be fulfilled:

⁸ M.8441 *Firstgroup/MTR Corporation/South Western Rail Franchise*, paragraph 15.

⁹ See e.g. Case M.3273 – *First/Keolis/TPE JV*, para. 7; Case M.5855 DB/Arriva, paragraph 73.

¹⁰ See e.g. Case M.2446 – *Govia/Connex South Central*, para. 14; Case M.5855 DB/Arriva, paragraph 74.

¹¹ Commission Notice on Case Referral in respect of concentrations (OJ C 56, 5.3.2005, p. 2-23).

- (a) there must be indications that the concentration may significantly affect competition in a market or markets,¹² and
 - (b) the market(s) in question must be within a Member State and present all the characteristics of a distinct market.¹³
- (41) Moreover, point 20 of the Notice provides that "*Concentrations with a Community dimension which are likely to affect competition in markets that have a national or narrower than national scope, and the effects of which are likely to be confined to, or have their main economic impact in, a single Member State, are the most appropriate candidate cases for referral to that Member State. This applies in particular to cases where the impact would occur on a distinct market which does not constitute a substantial part of the common market*".
- (42) The proposed transaction may significantly affect competition, given that the JV's platform services can be considered as complementary¹⁴ services to the Parties' transport services and that the Parties could decide to make use of the JV's platform services in order to offer MaaS services to travellers in their roles as MaaS providers.
- (43) The Parties, however, argue that this Transaction would not give rise to any competition concerns. In particular, the JV is intended to build an open platform and the strategy of the JV foresees not to require exclusivity from Mobility and MaaS providers, nor to foreclose access to its services, its customer base or to its data.
- (44) Nevertheless, the establishment of a new platform has the inherent risk that it will have the ability and incentive to foreclose rivals. This could be the case if the platform required exclusivity from its customers. There is a potential risk that the platform will require the MaaS providers and Mobility providers to exclusively connect to the JV platform and thus foreclose competitors of the JV on the market for IT services in the field of MaaS. An exclusive nature of a platform could foreclose competing platforms and significantly affect competition on this market in the Netherlands.
- (45) Similarly, the Transaction could incentivise the Parties to allow access for MaaS to their public transport services only through the JV's platform. As the Parties hold a very strong market position in public transport services in the Netherlands, this could prevent other suppliers to compete on the market for the wholesale supply of MaaS (platform) services.
- (46) Other possible theories of harm relate to the existence of open access to and neutrality of the platform and non-preferential access to data for the Parties. In case access to the platform for Mobility providers and MaaS providers would be subject to the fulfilment of discriminatory, non-transparent and non-objective criteria, this could lead to a significant restriction of competition in the markets for (public) transport in the Netherlands and in the market for retail distribution of MaaS services to end-users in the Netherlands. Also, if the Parties were granted preferential access to commercially relevant data of the JV, this could have a potential significant impact on competition in the market for (public) transport in the Netherlands.

¹² Further developed in point 17 of the Commission Notice on Case Referrals.

¹³ Further developed in point 18 of the Commission Notice on Case Referrals.

¹⁴ The Commission cannot exclude that the platform service may be or ultimately become a necessary input for MaaS services, as a result of the Transaction or due to the nascent nature of the markets for platforms and MaaS services.

- (47) These concerns were also raised by four complainants and the majority of respondents to the Commission’s pre-notification investigation.¹⁵
- (48) In light of the facts of the case, it cannot be excluded that these risks will materialise. The Parties could potentially engage in such foreclosure strategies, in light of their strong market positions in these markets, in particular in the market for public transport, where the market shares of the Parties would be in excess of 30% under any plausible market definition, whether at local level or at national level in the Netherlands.¹⁶
- (49) Therefore, the first legal requirement set forth by article 4(4) of the Merger Regulation appears to be met.
- (50) With regard to the second requirement, and in line with the above, the Commission considers that the relevant markets would be at most of national dimension.
- (51) In view of the foregoing, the preliminary assessment suggests that the proposed transaction may significantly affect competition within a Member State and that the effects of the Transaction would be restricted to the Netherlands. Furthermore, the markets in question present all the characteristics of a distinct market.

4.3.2. *Additional factors*

- (52) Given that the likely focus of the Transaction is confined to the Netherlands, the ACM is best placed to examine the case.
- (53) The ACM has gained relevant knowledge in relation to the Dutch mobility and IT markets and has the tools and expertise to review the concentration.¹⁷ In addition, the Commission recently adopted a decision granting full referral to the ACM in case M.9545 – NS Groep/Pon Netherlands/JV, which concerned the market for (retail) MaaS and therefore one side of the platform, so that both cases concern the ecosystem of the digital new mobility world in the Netherlands. Consequently, it appears appropriate that both cases are handled by the ACM.
- (54) Finally, the requested referral would preserve the principle of “one-stop-shop” to the extent that the case will be referred to a single competition authority, which is an important factor of administrative efficiency.

4.3.3. *Conclusion on referral*

- (55) On the basis of the information provided by the Parties in the Reasoned Submission, the case meets the legal requirements set out in Article 4(4) of the Merger

¹⁵ The case team conducted many pre-notification calls with market players in summer 2019.

¹⁶ The Parties provided confirmation that, based on public information from 2016 (CROW-KpVV estimates) on traveller kilometres (i.e. the total distance travelled by the customer) in the Netherlands, the Parties’ combined market share would be above 30% (36.3%). In addition, in a recent ACM study (Spoormonitor 2018, 22 March 2019), it is stated that NS covered 85% of the train kilometres in the Netherlands held by concessionaires in 2017 (Figure 3). If the relevant markets for public transport are based on the Parties’ respective concession territories (e.g. Amsterdam, Rotterdam, The Hague or NS’s Main Rail Network), as proposed by the Parties, each of the Parties would have a market share of 100% for public transport in its respective territory.

¹⁷ See decision of the ACM of 3 October 2012 in case 7436/NS Reizigers – Reisinformatie Prorail, decision of the ACM of 31 October 2011 in case 7273/HTM – Qbuzz – HTM Buzz; decision of the ACM of 9 December 2010 in case 6957/Veolia – CDC – Transdev; and the ACM’s 2018 market study into the market for mobility services.

Regulation in that the concentration may significantly affect competition in a market within a Member State (the Netherlands) which presents all the characteristics of a distinct market.

- (56) Furthermore, the requested referral would be consistent with points 17-23 of the Notice, in particular because the ACM appears to be the most appropriate authority to consider the Transaction.

5. CONCLUSION

- (57) For the above reasons, and given that the ACM has expressed its agreement, the Commission has decided to refer the Transaction in its entirety to be examined by the Netherlands. This decision is adopted in application of Article 4(4) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Olivier GUERSENT
Director-General